Supreme Court, U.S.
FILED

No. 95-1907 MAR 28 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

PATRICIO HOMERO SAENZ, JR.

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 28, 1996

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QUESTION(S) PRESENTED FOR REVIEW

1. Does the Court of Appeals violate Fifth Amendment due process by affirming a conviction after finding insufficient evidence to support the verdict under the district court's jury instructions?

2. Did the Sixth Amendment's "fair and impartial jury trial" clause require acquittal on appeal since a rational factfinder could not find guilt under the conjunctive instructions to the jury?

3. Is the proper standard 21 U.S.C. §§ 846 and 841(a)(1) or the trial court's jury instructions when measuring whether a rational factfinder could have found Petitioner guilty on the evidence?

4. Before appellate affirmance of Petitioner's conviction, was the prosecution burdened with proving all the offense's essential elements which the trial court described to the jury?

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This case's caption contains all parties' names to the proceedings in the court below of whose judgment review is sought.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner Patricio Homero Saenz (Saenz), Jr., respectfully prays a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished opinion of the U. S. court of appeals appears at this petition's appendix pages 1 to 48 (Pet.App. 1-48). The judgment and memorandum of the U.S. district court are also unpublished (Pet.App. 53-74).

BASIS FOR SUPREME COURT'S JURISDICTION

In this criminal case, the court of appeals entered its opinion on November 21, 1995. On December 29, 1995, the court of appeals denied a timely petition for panel rehearing (Pet.App. 49).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in part reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall any person be ... deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment in part reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

The U.S. district court had jurisdiction under 18 U.S.C. § 3231 because Petitioner was indicted for an offense against the laws of the U.S. in the western district of Louisiana's Lake Charles division.

On September 28, 1993, Saenz was so indicted only on count I (Pet.App. 50-52; 22R 1-15). It alleged Saenz and others violated the law by knowingly and intentionally combining, conspiring, confederating and agreeing together and with known and unknown persons to commit the following offenses against the U.S., to wit: to knowingly and intentionally import into the U.S. from the Republic of Mexico and to possess with intent to distribute in excess of 1,000 kilograms of marijuana, a Schedule I controlled

substance, and to knowingly and intentionally possess with intent to distribute in excess of 5 kilograms of cocaine, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. 841(a)(1) and 952(a), all in violation of 21 U.S.C. 846 and 963.

On May 4, 1994, the jury found Saenz guilty (35R 1414, 1425-1427; 26R 720) by checking on its verdict, which read (Pet.App. 102; 27R 720):

> As to the charge contained in Count I, conspiracy to import into the United States from Mexico and possess with intent to distribute marijuana, and to possess with intent to distribute cocaine we unanimously find that PATRICIO HOMERO SAENZ, JR. is
>
> __√__ GUILTY

The district court denied Saenz' timely motion for acquittal after the Government rested (34R 1246-1249, 1237-1260; 35R 1262-1267). That court denied Saenz' motion for new trial or acquittal after ruling on June 14, 1994 (26R 820-825):

> The basis of Saenz' position is that there was insufficient evidence introduced at trial to convict him. ***** Based upon the evidence introduced at trial, this court believes that the jury reasonably could have found Saenz guilty of the lengthy conspiracy charged in Count I in this case beyond a reasonable doubt.

On August 11, 1994, the district court sentenced Saenz to the custody of the U.S. Bureau of Prisons for a term of 121 months as to count I and assessed a five years supervised release term, and $50.00 special assessment fee (Pet.App. 53-55; 2R 23-25; 28R 1106-1112), after ruling in its sentencing memorandum of August 11, 1994 (28R 1091):

> In the defendant's sixth objection [to the PSR], ... Saenz asserts that cocaine was never a part of his agreement with the Lopezes. There has been no evidence produced by the government to prove that the cocaine was within the scope of Saenz' agreement with Lopez, therefore the cocaine will not be included in the base offense level.

This appeal followed. Later in compliance with the November 21, 1995 opinion of the court of appeals (Pet.App. 47-48), the district court resentenced Saenz on February 15, 1996, to the same earlier sentence (Pet.App. 65, 73-74).

Under the trial court's jury instructions, the evidence is insufficient to sustain Saenz' conviction of the count I conspiracy both to import into the U.S. from Mexico and to possess cocaine and marijuana with intent to distribute. The court of appeals so found (Pet.App. 39).

In those jury instructions, over no party's objection (34R 1259-1260; 35R 1403), the district court conjunctively listed all required to be proven for the jury to convict Saenz (Pet.App. 83-90; 34R 1259-1260; 35R 1403; 26R 685-688, 673-694), saying:

> For you to find any defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the defendant whose guilt or innocence is being considered:
>
> First: That two or more persons made an agreement to commit the crime of importation into the U.S. from Mexico and possessing with intent to distribute marijuana and possessing with intent to distribute cocaine as charged in the indictment; and
>
> Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.
>
> One may become a member of a conspiracy without knowing all of the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.
>
> *****
>
> A conspirator is responsible for offenses committed by other conspirators if the conspirator was

a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

Then on this sufficiency issue, the court of appeals said (Pet.App. 34, 39-41, 43-44):

> Saenz was convicted of one count of conspiring to import and possess both marijuana and cocaine with intent to distribute. He argues that the Government failed to prove beyond a reasonable doubt that he participated in the cocaine portion of the conspiracy.
>
> *****
>
> The evidence that Saenz joined the part of the conspiracy involving marijuana clearly is sufficient. Although there is sufficient evidence to tie him to the schemes of the Lopez organization with respect to marijuana, we find that there is insufficient evidence to prove beyond a reasonable doubt that he was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy. All of Saenz' transactions involved marijuana. While the evidence might allow speculation that he was implicated in the cocaine portion of the conspiracy or cocaine transactions, such speculation is not sufficient to support a guilty verdict. Nonetheless, as discussed below, the conspiracy conviction must stand.
>
> Anticipating that we might find the evidence as to the cocaine portion of the conspiracy insufficient, Saenz also contends that because the district court instructed the jury in the conjunctive regarding the marijuana and cocaine conspiracies, the evidence is

insufficient to support the conviction.[1] "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 654 (1970). As stated above, we believe the evidence is sufficient to show that Saenz participated in the marijuana portion of the conspiracy. Therefore, according to the rule in Turner, Saenz' conviction must be upheld.

*****

Griffin, however, teaches us that we are to presume that this did not occur. Instead, we are to presume that the jury based its decision on the evidence which proved beyond a reasonable doubt that the defendant participated in the particular object of the conspiracy. In the instant case, the jury found Saenz guilty of conspiring in regard to both marijuana and cocaine. Because either cocaine or marijuana satisfy the statute in question, and the evidence is sufficient to support the marijuana conspiracy, the facts of this case present a more compelling basis to sustain the conviction than did the facts in Griffin. Accordingly, we reject Saenz' due process challenge and affirm his conviction.

---

[1] Saenz cites a Texas case for the proposition that the jury should have followed the district court's instructions and thus, acquitted him for failure6 to prove that he was involved with both objects of the conspiracy. Although that may be the law in Texas, as set forth in the text, infra, due process does not require acquittal. In light of the Supreme Court precedent discussed in the text, we decline to adopt Saenz' argument.

REASONS FOR GRANTING PETITION

After a legislature proscribes conduct as a crime in the U.S.A., the judiciary has the responsibility to inform the criminal trial jury all the prosecutor must prove before an accused can be found guilty beyond a reasonable doubt. Those instructions become all the law of that trial court case. After being sworn to follow the law, the jury's role is to apply that law to the evidence and to determine whether or not the prosecutor's charges against the defendant are factually true. The informed jury can then render the fair and impartial trial guaranteed each accused by the Sixth Amendment only by following the trial court's jury instructions.

However, Fifth and Fourteenth Amendment due process requires a reversal of any jury conviction and an acquittal of the charge whenever the jury convicts an accused on a proof failure in spite of the clear requisites of the trial court's jury instructions. The underpinning of that constitutional rule was declared in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Winship was

decided on March 31, 1970, after argument on January 20, 1970.

On January 20, 1970, the Court decided Turner v. U.S., 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970). Turner declared a sufficiency review doctrine that "conjunctive really equals disjunctive." Turner so held without any reference to any constitutional principle later announced in Winship.

On June 14, 1978, the Court decided Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) and Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In Burks, the Court said, id. at 17, 98 S.Ct. at 2150 (footnote omitted):

> Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. Given the requirements for entry of a judgment of acquittal, the purpose of the Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple."

Neither Burks nor Greene discussed the continued vitality of appellate courts using the conjunctive doctrine of Turner.

The clashing principles from the Turner, Winship and Burks cases crashed against each other in Saenz' case in the courts below. Saenz contends the reign of the conjunctive-disjunctive sufficiency doctrine from Turner should now have already come to an end. Its internment needs to be declared by this Court. Then the bench and bar can view that portion of Turner in its historical context as a case time passed by.

Due process has an ever evolving meaning to the accuseds and courts across the U.S.

In spite of due process, strict stare decisis required the court of appeals to follow Turner and to affirm Saenz' conviction given the conjunctive jury instructions in both Turner and Saenz' case despite the Government's proof failure in the district court,

Turner was decided at a time before Winship, Burks and their sufficiency analysis and double jeopardy bar certain retrials. When Turner was decided, harmless error was the Government's failure to prove both prongs of the

dual manners of conviction which the trial court had required the jury to find before the jury could find defendant Turner guilty.

In nearly all criminal cases in federal and state courts across the U.S., the jury does not deliberate its verdict until after receiving all the applicable law and being told what the prosecution had to prove beyond a reasonable doubt before the jury could return a verdict finding the defendant guilty. Where such jury instructions are seriously erroneous to the defendant's disadvantage, the jury cannot a true verdict render on the facts and the law. Unless the defense waives such error, reversal for retrial often result. See Ratzlaf v. U.S., 510 U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); Cheek v. U.S., 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Saenz' conviction offers this Court a vehicle to overrule Turner. Fundamental now is declaration of such an end to a lawless era of over at least 25 years of jury and prosecution blunders being hidden behind appellate court

affirmances of criminal convictions despite proof failures of some of the essential elements which the trial court declared must be proven before the jury could convict the accused beyond a reasonable doubt.

Our republic is a democracy of law and order. Where the Sovereign's prosecutor fails to prove his or her case, the accused is presumed innocent and must be set free and vindicated of the criminal law violation. A citizen accused now is supposed to so benefit by acquittal in the trial court or later on appeal whenever the Government fails to carry its requisite proof burden beyond a reasonable doubt. Because Saenz has not received on appeal what all other not guilty appellants are constitutionally guaranteed, Saenz petitions is this final Court for his liberty and for a declaration of the end of the terrible reign of Turner. Only this Court can intern the continuing precedent value of Turner.

The court of appeals' opinion herein (Pet.App. 39-44) measured the sufficiency of the evidence not under the district court's conjunctive instructions to the jury, but merely against the disjunctive legislation proscribing Saenz'

conduct and the district court's imaginary jury instructions which were not but should have been given to explain all requisite disjunctive facts the jury had to find beyond a reasonable doubt before finding Saenz guilty.

After that appeals court's finding (Pet.App. 39) there is insufficient evidence to prove beyond a reasonable doubt Saenz was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy, the court of appeals followed Turner v. U.S., 396 U.S. 398, 420, 90 S.Ct. 642, 654, 24 L.Ed.2d 610 (1970), and rejected Saenz' due process right to an acquittal herein. Since Turner did not address that constitutional issue, the court of appeals should not have ignored the interrelation of Saenz' Fifth and Sixth Amendment rights to obtain an appellate acquittal for Saenz' chosen jury was duty bound to acquit after fairly and impartially determining the lack of the requisite conjunctive factual elements necessary for conviction under the instructions received from the district court.

As applied herein, this Court's subsequent applicable decisions raise serious issue as to the remaining vitality of that portion of Turner upon which the court of appeals

relied to uphold Saenz' conviction and to overrule Saenz' point of error. That point read:

> Under the trial court's jury instructions about Count I, the evidence is insufficient to sustain Saenz' conviction of the conspiracy both to import into the U.S. from Mexico and to possess cocaine and marijuana with intent to distribute.

Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979) articulated (footnote omitted):

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt.

See also Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 2080-81, 124 L.Ed.2d 182 (1993).

The burden of proof is on the Government to prove each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). An acquittal should follow insufficiency of such guilt evidence where any rational trier of fact could not find proof of the essential elements of the charged crime beyond a reasonable doubt ("subjective state

of near certitude"). Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Alternatively, the jury may only convict if there is an evidentiary certainty the defendant is guilty. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

The established rule of pleading in indictments is such elements are to be alleged in the conjunctive, even though the statute is worded in the disjunctive. Crain v. U.S., 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896).

In Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 468, 116 L.Ed.2d 371 (1991), the trial court instructed the jury permitting return of a guilty verdict on Count 20 if the jury found defendant participated in either one of the two alleged objects of the conspiracy: namely, impairing the efforts of either the Internal Revenue Service to ascertain income taxes or the Drug Enforcement Administration to ascertain forfeitable assets. The Griffin question presented for review was simply whether a general verdict of guilty under disjunctive circumstances such as existed there "is reversible." Id., at 468.

The appellate Griffin analysis based on the trial court's disjunctive jury instructions is inapplicable to the conjunctive jury instructions herein. Thus Griffin is inapplicable herein. To apply Griffin herein would extend Griffin, and would violate Saenz' Fifth and Sixth Amendment rights to constitutional due process and to be tried by an "instructed" jury and to have the evidentiary sufficiency reviewed on appeal only under the same law or legal standards as the jury was authorized to convict. Nothing less is demanded by the process due a jury's verdict and its review on appeal.

Review standards require a court of appeals to decide the evidence's sufficiency in light of and constrained by the four corners of the trial court's jury instructions. Otherwise, due process is denied. Dunn v. U.S., 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1968); Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

The issue here partially is whether or not harmless is the lack of evidential support for the jury verdict's

conjunctive finding. Acknowledging Saenz' timely acquittal motions under Fed. R. Cr. P. 29(a), (b) and (c) (34R 1249; 26R 820-825; 27R 861), does he have a substantial right to an appellate acquittal for a fair and impartial jury would have been required to acquit Saenz after scrupulously following the trial court's instructions on what was required to find Saenz guilty exactly as charged in the indictment?

Since Saenz' jury was so instructed by the trial court, the issue here is partially whether or not an appellate sufficiency affirmance requires proof beyond a reasonable doubt that Saenz' conduct was not only within the "statutory definition of the crime" but also within that definition described by the court's jury instructions and by the Sixth Amendment's "jury verdict of guilty beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 1239 (1993).

Because the district court instructed that before returning a guilty verdict the jury must find Saenz conspired to import and possess cocaine and marijuana with intent to distribute, then it was necessary there be sufficient

proof of both conspiratorial objects to import and to so possess cocaine and marijuana. "Otherwise, a guilty verdict would be deemed contrary to the law and the evidence." Ortega v. State, 668 S.W.2d 701, 707 (Tex.Crim.App. 1984) (on rehearing) (footnote omitted).

> "In sum, there is no such thing as 'surplusage' in the part of the court's instructions to the jury which authorizes a conviction, and if the prosecutor believes that portion of the charge unnecessarily increases his burden of proof, it behooves him specially to request a charge which correctly allocates burden placed on him by law ...."

Id. at 707 n. 5.

A case analogous to Saenz' acquittal request herein is U.S. v. Ruiz, 986 F.2d 905, 909 (CA5 1993). There the court reversed Crawford's conviction as to 18 U.S.C. § 2114, saying:

> However, the USDC [district court] instructed the jury that defendants could only be convicted under Count one (the Section 2114 charge) if "he intentionally displayed ... [the gun] in some manner." The government objected to this instruction which had been requested by defense counsel. We are faced therefore with a unique situation in which the court's instruction was not raised by the evidence, and for the reasons discussed in the preceding paragraph, was not legally correct; but the jury proceeded to find Crawford guilty under this count in spite of the instruction. Under these circumstances, we conclude that the proper result is to reverse Crawford's conviction on Count one

on the narrow ground that the evidence was insufficient to support the jury's verdict under the instruction as issued by the USDC.

Due process requires Saenz' appellate acquittal since a fair and impartial jury was obligated to follow the district court's instructions and acquit Saenz for the failure of proof on the conjunctive "cocaine and marijuana objects of the conspiracy."

Reversal must follow for on review one cannot presume the jury based its verdict on a disjunctive sufficient prong or theory because both theories and prongs were conjunctively submitted to the jury on a single count but only one of multiple theories submitted to a jury is sufficient. The jury's only law is found in the jury instructions. The Saenz jury was oath bound to completely accept and to unwaveringly follow all that law in reaching its verdict. This is required by the Bill of Rights' constitutional guarantees to Saenz of the rights to due process and trial by fair and impartial jury.

With the conjunctive theories submitted to the jury herein (Pet.App. 87), the government offered no objection to the instructions as tendered by the trial court to the jury.

"In reviewing the trial court's instructions to the jury, it is this court's duty to consider the charge as a whole, and from the viewpoint of the jury." Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44, 47 (CA5 1981) (Unit A). Therefore, the Government and appellate courts are bound by those instructions' terms. Thus, "both the government and the district court were mistaken about the law ... and therefore, Defendant's actions were not within the [applicable jury instruction's] definition of the crime". U.S. v. Self, 2 F.3d 1071, 1093 (CA5 1993).

The court's jury instruction (Pet.App. 75-101), as a whole, is a statement of the law which clearly instructs jurors as to the principles of law applicable to the factual issues confronting them. U.S. v. Pace, 10 F.3d 1106, 1120-21 (CA5 1993).

On appeal, the Government posited (Appellee's [Aee's] Brief 24-25):

> Even if a jury instruction is erroneous a conviction may be upheld if defendant failed to object on that ground. ***** The instruction favored the defendant. His failure to object to a favorable conjunctive jury charge should not operate to void his conviction which would be upheld if the charge had been disjunctive. ***** Absent sufficient evidence of Saenz' agreement

> to import and distribute cocaine the conviction should stand because there was sufficient evidence of his agreement with respect to marijuana.
>
> However, the trial court herein did not so instruct the jury.
>
> Finally, the jury was given no instructions on this theory, and we cannot at this late date reconstruct the government's case to affirm three convictions on a theory which was never adopted at trial.

U.S. v. Porter, 591 F.2d 1048, 1058 n. 6 (CA5 1979) [reversal since indictment failed to charge any crime].

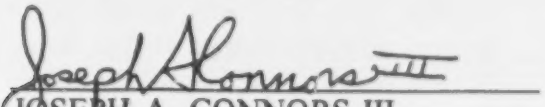
As viewed by the court of appeals (Pet.App. 39-44) and the Government on appeal, Saenz received due process of law when the jury convicted on evidence Saenz was guilty beyond a reasonable doubt of conspiring to import and to possess with intent to distribute marijuana. (Aee's brief 22). That is less proof than the trial court required for jury conviction, as the appeals court clearly recognized. Due process demands Saenz' acquittal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: March 28, 1996

Respectfully submitted by
Petitioner's Attorney,



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To The United States Court of Appeals
For the Fifth Circuit

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March 28, 1996

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40723

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTURO LOPEZ,
JOSE LUIS RODRIGUEZ,
FRANCISCO LOPEZ, and
PATRICIO HOMERO SAENZ, JR.,

Defendants-Appellants.

Appeal from
the United States District Court
for the Western District of Louisiana

(CR-93-20046)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have precedential value and merely decide

This direct criminal appeal involves four appellants who were convicted of various drug offenses. Among a number of complaints the appellants raise on appeal are the specific claims that: (1) the evidence is insufficient to support the convictions for a continuing criminal enterprise; (2) based on the jury charge, which instructed the jury conjunctively regarding the two objects of the conspiracy, the evidence is insufficient to support the conviction for conspiracy to import and possess with intent to distribute cocaine and marijuana; (3) and the district court miscalculated Saenz' base offense level at sentencing. After

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particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

carefully considering the record, briefs, and all argument of counsel, we find no error that would warrant the reversal of the convictions set out in the judgments of the district court. We do, however, vacate and remand the sentence of Patricio Homero Saenz, Jr. (Saenz). We write on only those arguments specifically set out above.

I. PROCEDURAL HISTORY

Arturo Lopez (Arturo), Francisco Lopez (Frank), Jose Luis Rodriguez (Rodriguez), and Saenz were indicted along with six other codefendants in a twenty-count indictment. The indictment charged Arturo and Frank with 17 counts (counts 2-18) of substantive offenses of possession with intent to distribute marijuana, one count (count 1) of conspiracy to import into the United States from Mexico and to possess with

intent to distribute in excess of 1,000 kilograms of marijuana and possess with intent to distribute in excess of 5 kilograms of cocaine; one count (count 19) of engaging in a continuing criminal enterprise; and one count (count 20), which incorporated counts 1-19 and sought forfeiture of the proceeds of the illegal activities in the amount of $2,673,000. Rodriguez and Saenz were also charged under count one.

Arturo, Frank, Rodriguez, and Saenz elected a jury trial, and the remaining codefendants either pleaded guilty or had the charges dismissed. The jury returned a verdict of guilty as charged as to counts 1-19 and, under count 20, a forfeiture of $2,673,000. The district court vacated the conspiracy convictions (count one) as to Arturo and Frank because that conspiracy was included as

lesser offenses under the continuing criminal enterprise.

The district court sentenced the defendants as follows: Arturo to 300 months imprisonment; Frank to 240 months imprisonment; Rodriguez to 50 months imprisonment; and Saenz to 121 months imprisonment. All four defendants now appeal.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE OF CONTINUING CRIMINAL ENTERPRISE

Arturo and Frank Lopez challenge the sufficiency of evidence to support their convictions for continuing criminal enterprise (CCE) in violation of 21

U.S.C. § 848.[1] To prove a CCE in violation of § 848, the Government must establish that the defendant "organized, supervised or managed five or more persons in a continuing series of drug violations from which [he] obtained substantial income." United States v. Tolliver, 61 F.3d 1189, 1215 (5th Cir. 1995). Frank challenges the proof to support every element of the CCE, and

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[1] Section 848(c) provides that a person is engaged in a CCE if:

(1) he violates any provision of [title 21] the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of [title 21]---

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
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> (B) from which such person obtains substantial income or resources.

Arturo contests every element except the proof to support "a continuing series of drug violations."

When reviewing the sufficiency of the evidence, we view all evidence, whether circumstantial or direct, in the light most favorable to the Government will all reasonable inferences to be made in support of the jury's verdict. United States v. Salazar, 958 F.2d 1285, 1290-91 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 185 (1992). The evidence is sufficient to support a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that

the evidence established guilt beyond a reasonable doubt. United States v. Faulkner, 17 F.3d 745, 768 (5th Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 193 (1994).

(1) Leader or Organizer of Five or More Persons

Specifically, Arturo argues that the evidence establishes that Frank and/or Tono[2] were the leaders and that he merely was a subordinate to them. At the most, Arturo argues, the evidence shows that he had some supervisory control over Tim Usher (Usher) and Delfino Perez (Delfino). We are not persuaded.

Our review of the evidence convinces us that Arturo was one of the leaders of this organization and supervised many individuals during its day-to-day

[2] Tono Lopez is a brother to Arturo and Frank.

operations. The evidence showed that Arturo: made key decisions as to the funding and transportation of numerous drug transactions; orchestrated the release or (sic) his subordinates from custody; and decided whether operatives were sufficiently trustworthy. We take time to detail some of the evidence supporting our finding.

Raymond Gribble (Gribble) had been dealing in marijuana for years and, through that business, had been introduced to Tono Lopez, who was purported to be a new connection in Dallas for marijuana transactions. Gribble met Frank and Arturo through their brother Tono. Gribble testified that when buying marijuana from the Lopez brothers, Arturo would be the one to weigh the marijuana on the scale and count the money.

In December 1990, the police stopped Gribble, searched his car, and seized $19,000 cash. He was given a receipt for the money and he altered the receipt by changing the number to $130,000. He then "ripped off" the Lopez brothers by sending them the receipt and claiming that the police took $130,000 cash from him. As a result, he claimed that he was not able to pay them. He initially informed Tono of the seizure. Subsequently, Frank called Gribble and "said [Gribble] really messed him up." Gribble responded that he had $30,000, and Frank "agreed to let [him] send that." Gribble also testified that Frank drove several different vehicles. On another occasion, Arturo discussed with Gribble how much money Gribble "had and what was going to take place." Arturo then made a few phone calls and left.

After a few hours, he returned with two hundred pounds of marijuana.

Usher testified that Arturo arranged his first trip to Dallas, instructing him to meet Tono and pick up around sixty thousand dollars cash in a tote bag. Usher did so. On the second trip to Dallas, Arturo picked up Usher, who was carrying somewhere between sixty and seventy thousand dollars, and eventually took him to a trailer belonging to Frank. At a different time, Usher brought twenty or thirty thousand dollars to the Lopez brothers in Corpus Christi.

Usher also testified that while he was in Jacksonville with thousands of dollars, Arturo instructed him to purchase an out-of-state newspaper, tape the cash in it, and place it in the door panels of the vehicle. Usher explained that he was instructed to do so because,

if the money was discovered, the police would be misled regarding its origin.

As a child, Larry Saldana (Saldana) lived in the same neighborhood as Arturo and Frank in Kingsville, Texas. In 1989, Arturo invited Saldana to come to Garland, Texas, to take over a produce business. On his way there, pursuant to Arturo's instructions, Saldana stopped in San Antonio "to pick up a load" in exchange for $1,200. While in San Antonio, Saldana rented a motel room. Arturo came to Saldana's room and directed Saldana to give him the car keys. Arturo apparently returned the keys to Saldana, who then drove to Garland with Arturo following him in another vehicle. Although Saldana never saw the "load" in the car, he understood that it was marijuana. At a motel in Garland, Arturo again instructed Saldana

to hand over his car keys. Additionally, Arturo paid Saldana either $1,200 or $1,500 for transporting the marijuana from San Antonio to Garland.

Upon moving to Garland, Saldana initially did take over Arturo's produce business. However, after about four months, the business "went down." Saldana then began driving trucks for a waste disposal company. During that time, he was "beeped" or "paged," and he returned that call to either Tono or Arturo. As a result, Saldana met Arturo and Tono in Seagoville, Texas, which was on his trucking route. Arturo "took over the truck," and they all went to meet Gribble. Saldana then agreed to transport by car a 138-pound load of marijuana for $2,500.[3] Saldana was

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[3] Gribble's testimony regarding this same incident is set forth above.

stopped during that trip and jailed in state court. He attempted to call and talk to Arturo, but each time Arturo would hang up the phone. Subsequently, Arturo talked to Saldana and told him to be patient because they would take care of everything. Although Saldana's bond was paid, he could not testify as to who paid it.

Arturo hired Billy Joe Taylor (Taylor) to take a load of marijuana from Dallas to Florida for $1,900. On a separate trip to Kingsville, Taylor was carrying a load of money and stopped to place it into Arturo's car. At that point, a patrol officer drove by causing them to proceed to another location to unload the money.

On another occasion, Arturo called Taylor and directed him to go to Delfino's house. Taylor complied, and a

man (apparently Delfino) put an ice chest full of money in the trunk of Taylor's car. The chest was similar to the ones Taylor earlier conveyed. Taylor transported the chest of money to a hotel in Houston and an unidentified man took possession of it. Taylor and the unidentified man went to a restaurant next door, and the man asked for the keys to Taylor's vehicle. The vehicle actually belonged to the "Lopez brothers, but they put it in [Taylor's] name." The man subsequently returned the keys to Taylor, and Taylor drove back to Dallas. Upon arriving in Dallas, Taylor called Arturo,[4] who directed Taylor to meet him at a Texaco station.

Delfino testified that he became involved in marijuana trafficking when

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[4] Taylor had Arturo's beeper number in a date book.

his friend, Caesar Fuentes (Fuentes), asked him if he was interested. Delfino responded affirmatively, and Fuentes took him to Tono's house and introduced him to Arturo. At this first meeting, Arturo pronounced Delfino "all right." A couple of days later, Fuentes called and advised Delfino to drive to Tono's house. Delfino drove there, and "they loaded the trunk" with one hundred pounds of marijuana. Delfino, along with his wife, was transporting the marijuana in exchange for $3,000. Arturo followed in another vehicle. In Pensacola, they all stayed at the Marriott Residence Inn. They then drove to Jacksonville and stayed at another Residence Inn. Arturo went to Delfino's room, picked up Delfino's car keys, and left. He came back after a couple of hours and returned the keys. During their stay, Delfino met

Usher and "Walter." Those two men brought in money to Arturo, and Delfino left. Arturo subsequently contacted Delfino and they all returned to Pensacola.

On Delfino's next trip for Arturo, he used a rented Lincoln Towncar.[5] On this trip, he picked up two hundred pounds of marijuana in Corpus Christi and drove to Jacksonville. Upon arriving in Jacksonville, Delfino paged Arturo with a Skytel Pager. Delfino waited, and Usher subsequently appeared and took the car keys. Usher returned after a few hours and dropped off the keys, stating that he probably would be back the next day to retrieve the car. Usher did return again for the car and later left it at the

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[5] During his association with Arturo, Delfino rented other cars for Taylor. Taylor did not have the requisite credit cards.

hotel. Delfino then drove to Corpus Christi and called Arturo, who appeared and briefly took the car. Arturo returned the car and paid Delfino. Delfino drove back to Texas not knowing whether he still was carrying anything.

When Delfino arrived home, Arturo called him and informed him there was a package missing. Delfino searched the car, but found nothing. Arturo asked him "to look real good up in the wheel wells and in the trunk." Delfino looked again but found nothing. He so informed Arturo, and Arturo replied that unless Delfino "got paid an extra ten," there was a package missing.

Clarence Smith (Smith) began purchasing small amounts of marijuana from Arturo in 1987 or 1988. In 1990, Arturo brought a vehicle loaded with two hundred pounds of marijuana to Smith's

house. Per Arturo's instructions, Smith transported the marijuana to Jacksonville, Florida. On his return to Texas, Smith delivered the payment of $50,000 cash to Arturo. For that delivery, Smith received two or three thousand dollars.

On a different occasion, Smith contacted Tono and Arturo in an attempt to obtain a large amount of marijuana ($180,000 worth) for Ron Kessinger. Arturo subsequently told Smith that there was a truck containing 800 pounds of marijuana, and he needed someone to move it. Arturo, Saenz, and another unidentified man took Smith to a house where a U-Haul truck was parked. Smith was to drive the truck to a house near Siene Road. Smith followed Arturo to the "stash house right down the road." Smith began unloading the marijuana, and some

other unidentified men placed it in the attic.

The next day, Arturo picked Smith up and they waited for the drivers that were supposed to haul the marijuana to Ohio. Arturo and Smith met Robert Malone and Louis Malone (the Malones) at an Exxon station. Arturo and Smith showed the Malones where the stash house was located, and the Malones loaded the marijuana themselves. Smith testified that Arturo never actually went to the stash house on either day.

The following morning Arturo took Smith to the airport and gave him $800 to purchase a plane ticket to Columbus, Ohio. Upon arriving in Ohio, Smith called Arturo to let him know that they (Smith and the Malones) all had arrived at the hotel. Smith also called Kessinger, who did not want to conduct

the transaction until the next morning. The next morning, Kessinger picked up Smith to take him to Kessinger's house, and the Malones followed. Upon arrival, they "backed up to a barn and started unloading the marijuana." At that point, they were arrested.

Based on the foregoing, we are not hesitant to conclude that the evidence is sufficient to show that Arturo was a leader or organizer of this organization and supervised at least five individuals (Delfino, Usher, Saldana, Taylor, and Smith) in a continuing series of drug violations.

Frank likewise argues that there was no evidence that he was a leader or organizer of five or more persons in a continuing series of criminal transactions. Indeed, Frank claims that, viewing the evidence in the light most

favorable to the Government, it could only be inferred that he had control over one individual, Taylor, who testified that he was hired by Frank Lopez to drive some money to McAllen, Texas.

The Government admits that there was less direct evidence that Frank, as opposed to Arturo, supervised five other persons, but nevertheless contends that it was sufficient. We agree.

Randy Easter (Easter) testified that he previously had cultivated marijuana and dealt in marijuana. He conducted "several transactions" involving "twenty-five or fifty pounds" with Frank. At one point, Frank advised Easter that he needed someone to drive. As a result, Easter talked to Taylor and determined that Taylor was interested. Subsequently, Taylor contacted Easter, requesting him to rent a vehicle. Easter

did so and received a bill from Hertz for approximately $1,800. Frank gave Easter the cash to pay the bill.

Taylor testified that he picked up money from Frank's house sometime in 1990 to take to Houston. Taylor also made similar trips to Corpus Christi and Kingsville. Subsequently, Frank purchased a motor home, and title to the vehicle was in Taylor's name. Taylor drove to Jacksonville, Florida with marijuana stored under the mattress in the motor home.

Taylor further testified that on another occasion Frank called and instructed him to come to Frank's house in Dallas, and Taylor complied. Frank loaded money in the car for Taylor to take to McAllen. Upon arriving in McAllen, Taylor beeped Arturo, and Arturo told him to proceed to Del Rio City.

Arturo met Taylor on the road, and they switched vehicles.

Frank announced to Taylor "about [two] or three times he [Frank] was the boss." Taylor had problems with Frank and spoke to Arturo about those problems. Arturo informed Taylor that if he "wanted to keep working with them, [he] would have to get along with Frank."

Delfino testified that four kilos of cocaine were seized by the police after he made the delivery. Arturo apprised him that he would not be paid for driving on that trip because of the cocaine seizure. Arturo also advised him that "Frank is going to be mad." Arturo further stated that he did not "even know if [he] should tell" Frank.

At one point, Frank stated that Delfino worked for them and that he owed money to the brothers. Because of

Delfino's debt, Frank informed Arturo that he might take Delfino's house.

The evidence is sufficient to show that Frank was a leader or organizer in this drug trafficking organization. Frank was the one who took possession of large amounts of money at the close of the drug transactions. Frank was the one who called Gribble about the purported seizure of $130,000 in drug proceeds. During that conversation, Frank negotiated and decided the amount that Gribble had to send to make up for the loss. Additionally, there was evidence that Frank referred to himself as the "boss."

The question regarding whether the Government proved that Frank supervised five individuals is a closer one. As Frank concedes, there is evidence that he directly supervised Taylor. There is

also evidence that he supervised Delfino and, arguably, Easter. The Government contends that the evidence shows that Frank also supervised the Malones and Saldana. We are not convinced that the evidence is sufficient to show that Frank directly supervised five individuals.

However, this Court has made clear that "[t]he CCE must not be rendered meaningless by permitting the head of a drug enterprise to insulate himself from liability by merely delegating authority to several lieutenants." United States v. Hinojosa, 958 F.2d 624, 630 (5th Cir. 1992).[6] Indeed, the evidence indicates that Frank did attempt to insulate

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[6] The Fourth Circuit agrees. "[A] defendant may not insulate himself from CCE liability by carefully pyramiding authority so as to maintain fewer than five direct sub-ordinates." United States v. Ricks, 882 F.2d 885, 891 (4th Cir. 1989), cert. denied, 493 U.S. 1047, 110 S.Ct. 846 (1990).

himself from the drug transactions. Gribble testified that Frank "always seemed to come in right when the deals were done and we had everything packaged up, and he would come in for the party."

In Hinojosa, we also opined that the language of the statute constrains us to include delegated authority within the definition of § 848(c). 958 F.2d at 630. The statute does not provide that the defendant must "directly" or "personally" organize, supervise, or manage five persons. Id. Further, the words "organize," "supervise," or "manage" are set forth disjunctively in the statute.

As the Government asserts, Arturo seemed to defer to Frank, but Frank did not defer to anyone. Although the evidence indicates that the brothers were partners, it also indicates that Frank was a senior or major partner in the

organization. Frank claimed to be boss, frequently appeared when the profits were to be harvested, and it would appear that members of the organization could not keep their jobs if they did not get along with Frank. Viewing the evidence in the light most favorable to the verdict, the jury could have easily concluded that Frank delegated authority to Arturo or was in charge of the overall operation, and thus, Frank was responsible for managing the same individuals that Arturo supervised. Accordingly, the evidence is sufficient to prove that Frank indirectly supervised at least five individuals.

(2) Substantial Income or Resources

Arturo next argues that there is no evidence that he received large profits from this venture. He contends that there is no evidence of large, expensive

purchases made with drug money or any showing that the alleged drug profits were funnelled elsewhere. He does admit, however, that the Government demonstrated that he purchased a Corvette for $17,000 in cash. Frank also asserts that the Government introduced no evidence that he obtained substantial income or resources from a continuing criminal enterprise.

The Government has met its burden of proof regarding the element of the defendant obtaining substantial income from drug trafficking if it establishes "that many thousands of dollars changed hands, and that some was received by the defendant." Tolliver, 61 F.3d at 1215. Further, if the evidence demonstrates that the defendant had the resources to engage in transactions involving large sales of narcotics, the requirement has been met. Id.

Usher testified that Arturo was his source of supply and that their association lasted from June 1989 until Usher was arrested in December 1990. Upon meeting Usher, Arturo pulled Usher aside and gave Usher his number to call if Usher were interested in doing business at a later date. Usher estimated that he received somewhere between 2,000 and 2,500 pounds of marijuana from Arturo and paid about $1,050 to $1,100 per pound. Usher thought the largest amount of money he had sent to the Lopez brothers was approximately $450,000, and the total amount of money that changed hands was "somewhere in the area of two million dollars." He further testified that "the money was being sent back to Arturo Lopez."

Similarly, Gribble testified that, at the end of the one drug transaction, it was Frank who took possession of the one hundred and five thousand dollars cash that Gribble had paid for the marijuana. On another occasion, Frank took fifty thousand dollars cash from Gribble for one hundred and seventy-five pounds of marijuana. During one transaction, Gribble was attempting to negotiate the price of the marijuana, and Tono stated that his brothers had "to get their quarter out of it," which would allow the jury to infer that Frank was being paid his share of the proceeds. Gribble testified that he never dealt with any other Lopez brothers. Clearly, there was a substantial income flowing from the conspiracy to both Arturo and Frank.

(3) Continuing Series of Drug Violations

Frank argues that the evidence is insufficient to show that he engaged in a continuing series of drug violations. Instead, he asserts, the evidence indicates that, on one isolated occasion, he sold one kilogram of cocaine to an undercover officer, Frank Perez, and on three or four other occasions, he engaged in drug transactions with Easter.

To the extent that Frank is arguing there were an insufficient number of transactions, he is mistaken. This Court has held that three predicate drug offenses suffice to prove the "continuing series" of violations element of a CCE. United States v. Hicks, 945 F.2d 107, 108 (5th Cir. 1991).

Frank further asserts that Easter's testimony regarding those three or four

drug transactions was not corroborated and that Easter was unsure of when those events purportedly occurred. Contrary to Frank's assertion, the jury was allowed to credit the testimony of Easter because it has the sole responsibility for determining the weight and credibility of the evidence. United States v. Harrison, 55 F.3d 163, 165 (5th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 324 (1995). As a result, we must construe all reasonable inferences from the evidence in support of the verdict. Id.

Finally, Frank argues that, while there may have been a conspiracy between Arturo and Tono and their codefendants, no evidence ties him to the conspiracy. In light of Gribble's testimony that Frank directly participated in three of the marijuana transactions he had with

the Lopez brothers, this argument clearly is without merit.

Accordingly, we find that the evidence is sufficient to sustain Arturo's and Frank's convictions for engaging in a continuing criminal enterprise.

B. INSUFFICIENT EVIDENCE TO SUPPORT CONSPIRACY CONVICTION

Saenz was convicted of one count of conspiring to import and possess both marijuana and cocaine with intent to distribute. He argues that the Government failed to prove beyond a reasonable doubt that he participated in the cocaine portion of the conspiracy.

To prove a conspiracy offense, the Government must prove beyond a reasonable doubt: (1) the existence of an agreement between two or more persons to violate the narcotics laws; that (2) each

conspirator knew of the conspiracy; (3) intended to join it; and (4) did participate in the conspiracy. United States v. Magee, 821 F.2d 234, 238-39 (5th Cir. 1987). There is, however, no requirement that an overt act be proved under this conspiracy statute, 21 U.S.C. § 846. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

The following evidence was revealed at trial. Robert Malone was involved with Saenz on at least three different occasions or trips where marijuana was transported. On the first trip, Malone and his father, Louis Malone, drove a load of marijuana to St. Louis. There, they met Saenz and unloaded approximately 300 pounds of marijuana. Because the buyer "couldn't handle that" much, they reloaded approximately 200 pounds of the marijuana.

Saenz and an another assistant instructed the Malones to follow them to Rock Island, and that the remainder of marijuana would be unloaded there. Apparently because of some perceived problems, they did not stop in Rock Island, but instead, drove to an unidentified house in Indiana. The marijuana then was placed in the barn. At that point, Saenz needed to go to Chicago to meet an individual who would drive the marijuana from Indiana to Chicago. Robert Malone rode with Saenz in Saenz' rented car to Chicago that night. The next day, Saenz and Robert Malone picked up a driver who had just flown to Chicago. They rented a car for the driver, and he followed them back to the barn in Indiana.

On their second trip, the Malones drove to an Exxon gas station in

Mesquite, Texas, and called a beeper number. Shortly thereafter, Saenz and Arturo "showed up." The Malones drove to the stash house, pulled the truck in the garage, and retrieved 306 pounds of marijuana from the attic. They then loaded it in the fake gas tank in the back of the truck and transported the marijuana to Ohio.

On a third occasion, Saenz called the Malones and instructed them to meet him at the same Exxon gas station, call the beeper number, and wait for someone to arrive. This trip appears to be the same one that Smith described in his testimony.

Additionally, Officer Mark Hanna, a police officer for the city of Moline, Illinois, testified that in January 1992, an investigation was initiated by a drug task force based on a tip received during

a telephone call. Officer Hanna and other officers drove to the American Motor Inn in Rock Island, Illinois. They were looking for a small blue vehicle and noticed it leaving the motel parking lot as they arrived. Two agents followed the vehicle. The registration was checked, and it was discovered that the car was a rental from Hertz in Chicago.

After the vehicle was stopped, Officer Hanna arrived on the scene. Hanna encountered Saenz, and $16,000 was recovered from the vehicle. A green note- book was seized that had names (including "Arturo") and telephone numbers in it that the members of the drug task force recognized as cocaine dealers. Also, a checking deposit slip in the name of Dr. Jesse J. Stewart was found. Officer Hanna knew Dr. Jesse Stewart because Stewart had been arrested

for delivery of cocaine. Additionally, Officer Hanna was familiar with names and phone numbers in the green notebook through his previous investigations.

The evidence that Saenz joined the part of the conspiracy involving marijuana clearly is sufficient. Although there is sufficient evidence to tie him to the schemes of the Lopez organization with respect to marijuana, we find that there is insufficient evidence to prove beyond a reasonable doubt that he was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy. All of Saenz' transactions involved marijuana. While the evidence might allow speculation that he was implicated in the cocaine portion of the conspiracy or cocaine transactions, such speculation is not sufficient to support a guilty

verdict. Nonetheless, as discussed below, the conspiracy conviction must stand.

Anticipating that we might find the evidence as to the cocaine portion of the conspiracy insufficient, Saenz also contends that because the district court instructed the jury in the conjunctive regarding the marijuana and cocaine conspiracies, the evidence is insufficient to support the conviction.[7] "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive,

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[7] Saenz cites a Texas case for the proposition that the jury should have followed the district court's instructions and thus, acquitted him for failure to prove that he was involved with both objects of the conspiracy. Although that may be the law in Texas, as set forth in the text, infra, due process does not require acquittal. In light of the Supreme Court precedent discussed in the text, we decline to adopt Saenz' argument.

... the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 654 (1970). As stated above, we believe the evidence is sufficient to show that Saenz participated in the marijuana portion of the conspiracy. Therefore, according to the rule in Turner, Saenz' conviction must be upheld.

Additionally, we note that if Saenz' jury had been instructed in the disjunctive, there is no question that the conviction would be affirmed. In Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466 (1991), the defendant had been charged in a multiple-object conspiracy, and the evidence demonstrated that she was involved in one object of the conspiracy but not the other. The district court nevertheless disjunctively

instructed the jury such that it could return a verdict against the defendant if it found that she had participated in either of the two objects of the conspiracy. The jury returned a general verdict of guilty. Relying primarily on the rule enunciated in Turner, supra, the Supreme Court rejected the defendant's due process challenge and upheld the conviction. The Court explained that because "jurors are well equipped to analyze the evidence," there is every reason to think that they would not rely on a factually inadequate theory. Griffin, 112 S.Ct. at 474 (emphasis omitted); accord United States v. Tomblin, 46 F.3d 1369, 1385 (5th Cir. 1995).

Although not controlling because the jury was instructed in the disjunctive regarding the objects of the conspiracy,

Griffin informs our decision in the case at bar. Indeed, it appears that the defendant in Griffin had a stronger due process argument because the jury might have found the evidence sufficient to support the defendant's participation in the object of the conspiracy that the appellate court deemed insufficient. Griffin, however, teaches us that we are to presume that this did not occur. Instead, we are to presume that the jury based its decision on the evidence which proved beyond a reasonable doubt that the defendant participated in the particular object of the conspiracy. In the instant case, the jury found Saenz guilty of conspiring in regard to both marijuana and cocaine. Because either cocaine or marijuana satisfy the statute in question, and the evidence is sufficient to support the marijuana

conspiracy, the facts of this case present a more compelling basis to sustain the conviction than did the facts in Griffin. Accordingly, we reject Saenz' due process challenge and affirm his conviction.

C. CALCULATION OF BASE OFFENSE LEVEL

Saenz raises a number of challenges to the amount of marijuana the district court used to calculate his base offense level. We have reviewed the record, and we find that, with the exception of one claim, the challenges are without merit or not properly preserved.

The district court found that, for the purpose of establishing relevant conduct under § 1B1.3, Saenz entered the conspiracy in September of 1991. Saenz argues that the district court erroneously included two loads of

marijuana, totalling 650 pounds, in his base offense level under relevant conduct. Saenz contends that those two loads of marijuana were transported prior to his joining the conspiracy. Specifically, in its memorandum ruling, the district court found that two marijuana transactions in March of 1992, in which Usher had been involved, were attributable to Saenz. Saenz contends that there is no support in either the presentence report or the trial record for this finding. The Government admits that there is no support in the record for this finding, but nevertheless, asserts that we are limited to reviewing it for plain error because Saenz did not make this specific objection before the district court.

Although the Government correctly asserts that Saenz did not object to

those two loads on this basis, he did object to the inclusion of those two loads, asserting that he was not responsible for them. This Court has explained that "[c]loser scrutiny may ... be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (citation omitted), cert. denied, 500 U.S. 924, 111 S.Ct. 2032 (1991).

The record reveals that Usher's association with the Lopez organization began in June of 1989 and ended in December of 1990, when Usher was arrested. As such, contrary to the district court's findings, it is clear that Usher could not have transported two loads of marijuana in March of 1992. Indeed, it is undisputed that Usher left

the conspiracy in December of 1990, prior to Saenz joining it in September of 1991. This Court has held that the district court cannot include conduct under § 1B1.3, if that conduct occurred prior to the defendant joining the conspiracy. United States v. Carreon, 11 F.3d 1225, 1228 (5th Cir. 1994). Under that scenario, it was error for the district court to attribute to Saenz any of Usher's loads of marijuana. Therefore, Saenz' sentence is vacated and remanded for further proceedings.

With respect to the remaining arguments of the four appellants, we have considered briefs and oral arguments of counsel and the pertinent parts of the record, and conclude there is no error requiring reversal.

Accordingly, the convictions and sentences of Arturo Lopez, Frank Lopez,

and Jose Rodriguez are AFFIRMED; the conviction of Patricio Saenz is AFFIRMED and his sentence is VACATED and REMANDED for further proceedings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NUMBER 94-40723

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UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

ARTURO LOPEZ, JOSE LUIS RODRIGUEZ, FRANCISCO LOPEZ and PATRICIO HOMERO SAENZ, JR.

Defendants-Appellant.

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Appeal from the
United States District Court for the
Western District of Louisiana

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ON PETITION FOR REHEARING

(December 29, 1995)

Before SMITH, BARKSDALE and BENAVIDES.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA		§	
		§	CRIMINAL NO.
VERSUS		§	CR93-20046
		§	21 U.S.C. § 846
ARTURO LOPEZ	(01)	§	21 U.S.C. § 963
FRANCISCO LOPEZ	(02)	§	21 U.S.C. § 848
JOE TORBELLIN, JR.	(03)	§	21 U.S.C. § 841(a)(1)
EDWARDO MARIO VELEZ	(04)	§	18 U.S.C. § 2
		§	21 U.S.C. § 853
RANDY LYNN EASTER	(05)	§	
WALTER C. GARLITZ	(06)	§	
TERRY LOGAN	(07)	§	
JOSE LUIS RODRIGUEZ	(08)	§	JUDGE TRIMBLE
		§	MAGISTRATE JUDGE
PATRICIO HOMERO SAENZ, JR.	(09)	§	WILSON
CESAR FUENTES	(10)	§	

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT I

THE CONSPIRACY

Beginning on or about the 1st day of October, 1988 and continuing until on or about the 27th day of September, 1993, in

elsewhere, the defendants, ARTURO LOPEZ, FRANCISCO LOPEZ, RANDY LYNN EASTER, WALTER C. GARLITZ, TERRY LOGAN, JOSE LUIS RODRIGUEZ, JOE TORBELLIN, JR., EDWARDO MARIO VELEZ, CESAR FUENTES, and PATRICIO HOMERO SAENZ, JR., did knowingly and intentionally combine, conspire, confederate and agree together, and with diverse other persons to the grand jury known and unknown, to commit the following offenses against the United States, to wit: to knowingly and intentionally import into the United States from the Republic of Mexico and to possess with intent to distribute in excess of 1,000 kilograms of marijuana, a schedule I controlled substance, and to knowingly and intentionally possess with intent to distribute in excess of 5 kilograms of cocaine, a Schedule II narcotic controlled substance, in

kilograms of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 952(a), all in violation of Title 21, United States Code, Sections 846 and 963. [21 U.S.C. §§§§ 846, 963, 841(a)(1) and 952(a)].

UNITED STATES DISTRICT COURT

Western District of Louisiana

UNITED STATES OF AMERICA

v. Case Number CR 93-20046-09

PATRICIO HOMERO SAENZ, JR.
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

The defendant, PATRICIO HOMERO SAENZ, JR., was represented by Calixtro Villarreal, Jr. and Joseph A. Connors, III.

The defendant was found guilty on count(s) I after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense
21 USC 846, 963, 841(a)(1) and 952(a)	Conspiracy to import into the U.S. from Mexico and possess with intent to distribute marijuana, and to possess with

	intent to distribute cocaine
Date Offense Concluded	Count Numbers
09-27-93	I

As pronounced on August 11, 1994, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) I, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 11th day of August, 1994.

/s/ James T. Trimble, Jr.
United States District Judge

Defendant's SSAN: 466-15-7046
Defendant's Date of Birth: 12/30/62
Defendant's address: Rt. 1, Box 520B;
Edinberg (sic), TX 78539

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 121 months.

The Court makes the following recommendations to the Bureau of Prisons: Incarceration at a facility that satisfies the security requirement for the defendant that is closest to Mr. Saenz's home.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____

to _____ at _____,
with a certified copy of this Judgment.

_____
United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Report in person to the probation office as directed.
2. The defendant shall not own or possess a firearm or destructive device.

3. The defendant shall perform 300 hours of community service within the first 24 months of beginning supervised release.

4. If recommended by U.S. Probation or a mental health counselor, the defendant shall participate in substance abuse treatment as directed by U.S. Probation, including urinalysis at the defendant's cost.

STANDARD CONDITIONS
OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the pre-sentence report except as noted in the attached memorandum ruling.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	1
Imprisonment Range:	121 months to 151 months (10 years statutory minimum)
Supervised Release Range:	at least 5 years
Fine Range:	$17,500 to $4,000,000
Restitution:	$n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: Conformity with U.S. Sentencing Guidelines and severity of offense.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 853a(a)

IT IS ORDERED that the defendant shall be ineligible (sic) all federal

benefits for a period of 5 years ending May 4, 1999.

Pursuant to 21 U.S.C § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veteran's benefit, public housing, or other similar benefit, of any other benefit for which payment or services are required for eligibility.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	§	DOCKET NO. 93-20046-09
VS.	§	JUDGE TRIMBLE
PATRICIO HOMERO SAENZ, JR.	§	MAGISTRATE JUDGE WILSON

MEMORANDUM ORDER

The defendant has come before this court for re-sentencing pursuant to an order by the Fifth Circuit Court of Appeal. The defendant has filed the following documents:

Defendant's Personal Statement (11 handwritten pages);
Defendant's Statement (10 type-written pages);
"Defendant Saenz Motion Renewing As To The Presentence Report and Its Addendums For Sentencing On February 15, 1996, All His Objections To Previously Filed Herein on July 5, 1994 and Received Herein on July 18, 1994";
Defense's Opposed Motion to Use Federal Sentencing Guideline Section 2D1.1(b)(4);
Saenz' First Objections To District Court's Memorandum Ruling of

August 14, 1994 filed December 22, 1995;

Saenz's First Opposed Motion for Potential Continuance of Sentencing on February 15, 1996;

Saenz' First Opposed Motion for Downward Departure at Sentencing on February 15, 1996; and

Defense's Third Set of Saenz' Sentencing Objections.

The first and second statements require no ruling by the court, but the court has read the statements prior to sentencing.

The Fifth Circuit heard the defendant's appeal, as well as the appeals of his co-defendants. The court affirmed the convictions and sentences of Arturo Lopez, Frank Lopez, and Jose Rodriguez. The conviction of Saenz was affirmed, but his sentence was vacated and remanded for further proceedings. In Saenz' case, the appellate court found that this court was in error for attributing to Saenz any of Usher's loads

of marijuana. The Fifth Circuit did not find fault with this court's reasoning in its computation of any of the other quantities of drugs attributable to the defendant. In this court's original Memorandum Ruling in response to the defendant's original objections, the court attributed 650 pounds of marijuana to Usher. When this amount is subtracted from the quantity attributed to the defendant, it reduces the total amount of marijuana to 2267 pounds or 1028 kilograms. This adjustment has no effect on the offense level of 32 nor the guideline range of 121 to 151 months.

In reviewing U.S.S.G. §2D1.1(b)(4), the court notes element (5) of §5C1.2 which states that:

> "**not later than the time of the sentencing hearing**, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the

> offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude determination by the court that the defendant has complied with this requirement" (emphasis added).

It is not disputed that the defendant meets elements 1 through 4. The Government, however, contends that he did not meet the requirement number 5 prior to the original sentencing, or prior to this sentencing. The court has been advised that in the Kansas City investigation, the defendant received a letter of nonprosecution in exchange for his cooperation. In the Rock Island investigation, the defendant has not yet fully debriefed. His potential cooperation is not sufficient to invoke the fifth prong of §5C1.2. In addition, the Government through AUSA Grayson

asserts that the defendant has continued to refuse to give information on cocaine and suppliers in Texas. Therefore, the defendant's Motion to Invoke §2D1.1(b)(4) is DENIED.

Additionally, the defendant's Motion to Continue his re-sentencing until such time as he does cooperate is also DENIED as is the defendant's Motion to Reurge all of his original objections to the Presentence Report and its Addendums.

The defendant's "First Objections to the District Court's Memorandum Ruling of August 14, 1994" was not filed until December of 1995, after the Court of Appeal vacated the original sentence. In this objection the defendant is attempting to reargue the entire factual basis for the quantity of drugs attributed to him, not only the amount that the Fifth Circuit found in error.

This court will not redetermine the entire amount of drugs, nor will it entertain all of the original objections again. An adjustment has been made according to the Fifth Circuit's ruling which deleted 650 pounds of marijuana. The defendant's first objection is therefore also DENIED.

The defendant also requests a downward departure based upon §5K2.0, arguing that Saenz's need for alcohol and drug rehabilitation is a factor that was not adequately considered by the Sentencing Commission in formulating the guidelines. This motion is DENIED. This court finds that the Sentencing Commission did adequately consider the potential need for alcohol and drug rehabilitation in the formulation of the Guidelines.

The defendant in this case is not arguing diminished mental capacity (§5K2.13) as a result of his drug use, nor is he arguing that he is entitled to a downward departure based upon complete drug rehabilitation efforts. The defendant is arguing that he is entitled to a downward departure because he needs drug rehabilitation, but he is not eligible for the prison program until he is within 36 months of release. He is afraid that budget cuts will terminate the program before he can avail himself of rehabilitation.

The defendant's argument albeit novel, is not persuasive. Although this court indicated at the original sentencing that 121 was more than the defendant would be sentenced to if the court had such discretion, the court will

not violate the guidelines in an effort to depart without grounds.

In U.S. v. Akin, 62 F.3d 700 (5th Cir. 1995), the court held that the defendant was not entitled to a downward departure based upon his participation in an alcohol rehabilitation program. The court noted that five circuits allow a downward departure for a defendant's extraordinary presentence efforts at alcohol or drug rehabilitation, while six other circuits do not allow such departures. Id., at 603, fn 3. The Fifth Circuit does not allow such departures. The Second Circuit, cited by the defendant, is one of the circuits that does allow such departures. In this case we are not discussing presentence rehabilitation. We are discussing desired rehabilitation.

In determining if the Sentencing Commission adequately considered drug addiction and the need for rehabilitation, the court can only consider the Sentencing Guidelines, policy statements, and official commentary of the Commission. U.S.S.G. §5K2.0; 18 U.S.C.A. App.; 18 U.S.C.A. §3553(b). In U.S. v. Williams, 948 F.2d 706 (11th Cir. 1991), the defendant appealed contending that the district court erred in ruling that it had no discretion to make a downward departure on the basis of progress toward recovery from drug addiction. The appellate court held, however, that post-arrest, presentence recovery from addiction is a mitigating factor of a kind that was adequately considered by the Commission in fashioning the two-level reduction in offense level for acceptance of

responsibility. The court noted that such rehabilitation efforts could exceed the degree of recovery contemplated by §3E1.1 and occasionally warrant a downward departure. Under the facts of Williams, the court held that although William's progress was "exceptional", it was not enough to qualify for a downward departure. In this case, the defendant has not yet attended rehabilitation. If exceptional progress in rehabilitation was not sufficient to depart, desired rehabilitation cannot be enough.

In U.S. v. Williams, 65 F.3d 301 (2d Cir. 1995), cited by the defendant, the Second Circuit held that it was within the district court's discretion to grant a downward departure from the guidelines so that the defendant could enter a drug treatment program to which he had been admitted. Much of the language argued by

the defendant came from the court's reasoning in this case, but this holding is not consistent with Fifth Circuit precedent and this court is not willing to depart without a clear mandate from the Fifth Circuit authorizing it to do so.

For the same reasons stated above for the other objections, the defendant's third set of objections is also DENIED. The Fifth Circuit, in its opinion in this case stated at page 22:

> "Saenz raises a number of challenges to the amount of marijuana the district court used to calculate his base offense level. We have reviewed the record, and we find that, **with the exception of one claim**, the challenges are without merit or not properly preserved."

That one claim is the 650 pounds attributable to Usher and removed for the purpose of this resentencing. As stated earlier, this court will not revisit nor

entertain new objections as to the base offense level already affirmed by the appellate court.

Lake Charles, Louisiana this 15th day of February, 1995.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	§	DOCKET NO. 93-20046-01/02/08/09
VS.	§	JUDGE TRIMBLE
PATRICIO HOMERO SAENZ, JR.	§	MAGISTRATE WILSON

COURT'S INSTRUCTION TO THE JURY

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It is my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your

consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. In determining what actually happened in this case -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow all of the rules of law as I explain them to you.

You must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The defendants have been charged by the government with violations of federal

law. The indictment is simply the description of the charge made by the government against the defendants; it is no evidence of their guilt. Indeed, each defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence

***** (pages 3-7 and part of p. 8 have been omitted)

In any criminal case the government must prove not only the essential elements of the offense or offenses charged, as hereinafter defined, but must also prove, of course, the identity of the defendant as the perpetrator of the alleged offense or offenses.

In evaluating the identification testimony of a witness you should consider all the factors already mentioned in your assessment of

credibility of any witness in general, and should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at the time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

You may also consider the circumstances surrounding the identification itself including, for example, the manner in which the defendant was presented to the witness for identification, and the length of time that elapsed between the incident in

question and the next opportunity the witness had to observe the defendant.

If, after examining all of the testimony and evidence in this case, you have reasonable doubt as the identity of the defendant as the perpetrator of the offense charged, you must find the defendant not guilty.

A separate crime is charged against one or more of the defendants in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate

consideration to the evidence as to each defendant.

In determining whether any statement, claimed to have been made by any defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, you should consider the evidence concerning such a statement with great care, and should give such weight to the statement as you feel it deserves under the circumstances.

You may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the defendant, his or her treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Of course, as I have instructed you already during the course of this trial, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

I caution you, members of the jury, that you are here to determine the guilty or innocence of each accused from the evidence in this case. You are here to decide whether the government has proved beyond a reasonable doubt that each defendant is guilty of the crimes with which he or she is charged. No defendant is on trial for any act or conduct or offense not alleged in the Indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

Count I of the indictment alleges that the defendants, Arturo Lopez, Francisco Lopez, Jose Luis Rodriguez, and Patricio Homero Saenz, Jr., did knowingly and intentionally combine, conspire, confederate and agree together, with each other, and with diverse other persons to the Grand Jury known and unknown, to import into the United States from Mexico and possess with intent to distribute marijuana, a Schedule I controlled substance, and to possess with intent to distribute cocaine, a Schedule II controlled substance in violation of Title 21, United States Code, Sections 846, 963, 841(a)(1), and 952(a).

***** (parts of pages 11-12 have been omitted)

Title 21, United States Code, Section 841(a)(1), makes it a crime for anyone knowingly or intentionally to

possess a controlled substance with intent to distribute it.

Marijuana and cocaine are both controlled substances within the meaning of this law.

For you to find any defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a controlled substance;

Second: That the substance was in fact marijuana or cocaine; and

Third: The defendant possessed the substance with the intent to distribute it.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another

person, with or without any financial interest in the transaction.

"Possession," as that term is used in this case, may be of two kinds: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive

possession of a thing possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant about whom you are deliberating had actual or constructive possession, either alone or jointly with others.

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case, each defendant is charged with conspiring to possess with intent to distribute cocaine and marijuana.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in

crime" in which each member becomes the agent of every other member.

For you to find any defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the defendant whose guilt or innocence is being considered:

First: That two or more persons made an agreement to commit the crime of importation into the U.S. from Mexico and possessing with intent to distribute marijuana and possessing with intent to distribute cocaine as charged in the indictment; and

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

One may become a member of a conspiracy without knowing all of the

details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the conspirators entered into any formal agreement, nor that they directly stated between themselves all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of the conspiracy, does not thereby become a conspirator.

You must determine whether the conspiracy charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find

that a defendant was not a member of the conspiracy charged in the indictment, then you must find the defendant not guilty, even though that defendant may have been a member of another conspiracy.

A conspirator is responsible for offenses committed by other conspirators if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

Therefore, if you have first found a defendant guilty of the conspiracy charged in Count I and if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, other conspirators committed the offenses in Counts II through XVIII in furtherance of or as a foreseeable consequence of that conspiracy, then you

may find the defendant guilty of the Counts in which he is charged, even though that specific defendant may not have participated in any of the acts which constitute the offenses described in those Counts.

Title 21, United States Code, Section 952(a) makes it a crime for anyone knowingly and intentionally to import a controlled substance.

Both marijuana and cocaine are controlled substances within the meaning of this law.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant brought a quantity of cocaine or marijuana into the United States from a place outside the United States; and

Second: That the defendant knew that the substance he was bringing into the United States was a controlled substance.

***** (parts of pages 16-17 have been omitted)

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything one can do for himself may also be accomplished by that person through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another person is acting under the direction of the defendant or if the defendant joins another person and

performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and the conduct of such other persons just as though the defendant had committed the acts or engaged in the conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a

participant ant (sic) not merely a knowing spectator.

In other words, you may not find the defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant being considered voluntarily participated in its commission with the intent to violate the law.

If any defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

The word "knowingly", as that term has been used from time to time in these instructions, means that the act was done

voluntarily and intentionally and not because of mistake or accident.

You may find that a defendant has knowledge of a fact if you find that the defendant deliberately closed his or her eyes to what would otherwise have been obvious to him or her. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself or herself to the existence of a fact.

You will note that the indictment charges that the offense was committed "on or about" a specified date. The Government does not have to prove that any of the crimes charged were committed on that exact date, so long as the Government proves beyond a reasonable doubt that the defendant committed the

offense on a date reasonably near the date alleged.

Exhibit 18B1 has been identified as a typewritten transcript of the oral conversation which can be heard on the tape recording received into evidence as Exhibit 18B.

I have admitted the transcript for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the tape recording.

However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript, and from your own

examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

The government and the defendants have stipulated — that is, they have agreed — that certain facts are as counsel have stated in Exhibit J-1. You should therefore treat those facts as having been proven.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your mind if convinced that you were wrong. However, do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges --- judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved each

defendant guilty beyond a reasonable doubt.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. [Explain the verdict form.]

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with me, the foreperson should write your message or question, sign it, and pass the note to the court security officer who will bring it to my attention. I will then respond

as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never reveal to any person, not even the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

In deliberating on and arriving at a verdict, you should give this case the same careful and deliberate consideration you would give to any other serious and important matter in life, and the verdict you return should be one which completely satisfied your mind and conscience that to the very best of your ability you have interpreted the facts and have applied the law truly, correctly, and impartially.

Lake Charles, La.
May 4, 1994

/s/ James T. Trimble, Jr.
James T. Trimble, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	§	DOCKET NO. 93-20046-01/02/08/09
VS.	§	JUDGE TRIMBLE
PATRICIO HOMERO SAENZ, JR.	§	MAGISTRATE WILSON

VERDICT

1. As to the charge contained in Count I, conspiracy to import into the United States from Mexico and possess with intent to distribute marijuana, and to possess with intent to distribute cocaine, we unanimously find that PATRICIO HOMERO SAENZ, JR. is

_____ NOT GUILTY

_____√_____ GUILTY

Lake Charles, La.
May 4, 1994

/s/ Jo Ann Cook
FOREPERSON